No. 10-776

In the Supreme Court of the United States

ANH JOSEPH CAO, ET AL., PETITIONERS

v.

FEDERAL ELECTION COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that the limits on coordinated expenditures by a political party in the Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.*, can constitutionally be applied to communications that a party coordinates with its candidates and then adopts as its "own speech."

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 9
Conclusion 21

TABLE OF AUTHORITIES

Cases:

Buckley v. *Valeo*, 424 U.S. 1 (1976) 5, 9, 10, 11, 14, 15
California Med. Ass'n v. *FEC*, 453 U.S. 182 (1981) 3
Citizens United v. *FEC*, 130 S. Ct. 876 (2010) 14
Colorado Republican Fed. Campaign Comm. v. *FEC*, 518 U.S. 604 (1996) 10
FEC v. *Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) ..... *passim*
FEC v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) 17
Gonzalez v. *Carhart*, 550 U.S. 124 (2007) 17
McConnell v. *FEC*, 540 U.S. 93 (2003) 11
Republican Nat'l Comm. v. *FEC*, 698 F. Supp. 2d 150 (D.D.C. 2010), aff'd, 130 S. Ct. 3544 (2010) 17, 18
Zobrest v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) 19

Constitution, statutes and regulations:

U.S. Const. Amend. I 4
Federal Election Campaign Act, 2 U.S.C. 431 *et seq.* 2
2 U.S.C. 431(8)(A) 2

Statutes and regulations—Continued: Page

2 U.S.C. 437h 3
2 U.S.C. 441a(a)(1) 2
2 U.S.C. 441a(a)(7)(B)(i) 2
2 U.S.C. 441a(d) 2
11 C.F.R. Pt. 109:
Section 109.21(d)(1)-(6) 3
Section 109.21(d)(2)(v) 20
Section 109.37 2
Section 109.37(a)(2)(i) 2
Section 109.37(a)(2)(ii) 2
Section 109.37(a)(2)(iii)(A) 2
Section 109.37(a)(2)(iii)(B) 2
Section 109.37(a)(3) 3

Miscellaneous:

Coordinated Communications, 71 Fed. Reg. (2006):
p. 33,190 16
p. 33,206-33,207 16
FEC:
http://www.fec.gov/press/bkgnd/cf_summary_info/2010party_Summary/1demfedactivity2010.pdf 16
http://www.fec.gov/press/bkgnd/cf_summary_info/2010party_Summary/2repfedactivity2010.pdf .. 16
FEC Matter Under Review 5887 (Republican Main Street Partnership-PAC), General Counsel's Report #2 (http://eqs.nictusa.com/eqsdocsMUR/29044243895.pdf) 21

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-88a) is reported at 619 F.3d 410. The opinion of the district court (Pet. App. 89a-194a) is reported at 688 F. Supp. 2d 498.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 2010. The petition for a writ of certiorari was filed on December 6, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Election Campaign Act (FECA or Act), 2 U.S.C. 431 *et seq.*, limits the amounts that individuals, political parties, and other political committees can contribute to a federal candidate. 2 U.S.C.

441a(a)(1). FECA's contribution limits apply both to direct contributions of money and to in-kind contributions of goods or services. 2 U.S.C. 431(8)(A). For purposes of those contribution limits, an expenditure made "in cooperation, consultation, or concert, with" a candidate or his campaign (known as a coordinated expenditure) "shall be considered to be a contribution to such candidate." 2 U.S.C. 441a(a)(7)(B)(i). FECA permits political parties, unlike other entities, to make coordinated expenditures up to specified amounts that are above the limits applicable to other types of party contributions to candidates. 2 U.S.C. 441a(d).

Under regulations promulgated by the Federal Election Commission (FEC or Commission), a party-funded public communication (such as a political advertisement) constitutes a coordinated expenditure under FECA if it both contains a certain type of content and is the result of a certain type of conduct. 11 C.F.R. 109.37. A party-funded communication satisfies the content requirement if it either (1) at any time of year, "disseminates, distributes, or republishes * * * campaign materials prepared by a candidate" or "expressly advocates the election or defeat of a clearly identified candidate," 11 C.F.R. 109.37(a)(2)(i) and (ii); or (2) during the 90-day period before a congressional election, or the 120-day period before a presidential election, refers to a clearly identified federal candidate and is disseminated within that candidate's jurisdiction, 11 C.F.R. 109.37(a)(2)(iii)(A) and (B). A party-funded communication satisfies the conduct requirement if, *inter alia*, the creation, production, or distribution of the communication is requested or suggested by the candidate, or if the candidate is "materially involved" in decisions regarding, *inter alia*, the content or timing of the commu-

nication. 11 C.F.R. 109.21(d)(1)-(6); see 11 C.F.R. 109.37(a)(3).

2. a. Petitioners are Anh "Joseph" Cao, a former United States Representative for the Second Congressional District of Louisiana, and the Republican National Committee (RNC), the national committee of the Republican Party. Pet. App. 2a. In 2008, while Cao was running for election to the House of Representatives, he and the RNC filed a declaratory-judgment action against the Commission in the United States District Court for the Eastern District of Louisiana. *Ibid.* Petitioners filed the suit pursuant to 2 U.S.C. 437h, a special judicial-review provision of FECA. Section 437h permits certain persons (including petitioners) to challenge the constitutionality of the Act in federal district court and requires that court to make findings of fact and to certify nonfrivolous constitutional challenges to the en banc court of appeals. See *California Med. Ass'n* v. *FEC*, 453 U.S. 182, 193 n.14 (1981).

Petitioners raised several First Amendment challenges to the Act, including a challenge to the coordinated-expenditure provisions. Pet. App. 2a.[1] Petitioners alleged that the RNC wished to run a radio advertisement expressly advocating the election of then-candidate Cao and explaining the basis for the RNC's support of Cao. *Id.* at 24a. They further alleged that the RNC wanted to coordinate with Cao the "best timing" for broadcasting the advertisement. *Ibid.* The

[1] Although the 2008 election is over, the Commission agrees with petitioners that the case is not moot with respect to the RNC because the issue before this Court is capable of repetition yet evading review. Pet. 5 n.2. The Commission is unaware of whether Cao intends to run for federal office again. If Cao has no such intent, the case is moot with respect to him.

court of appeals later determined, based upon representations by petitioners' counsel both at oral argument and in a post-argument letter to the court, that the RNC also intended to provide Cao "with advance knowledge" of the advertisement's content. *Id.* at 43a; see *id.* at 43a n.29 (detailing concession at oral argument); *id.* at 38a n.26 (describing supplemental letter from petitioners explaining that the "RNC provides a specific ad, a specific coordinating candidate, and specific detail as to coordination nature (timing, with content awareness)").

Petitioners alleged that FECA prohibited the RNC from running the advertisement because it would be considered a coordinated expenditure and the RNC had already reached its coordinated-expenditure limit for the relevant election. Pet. App. 24a-25a. Petitioners contended that this limitation was unconstitutional because the First Amendment prohibits restrictions on coordinated expenditures that are a party's "own speech." As summarized by the court of appeals, the RNC's "only argument" on this issue was that

> its own speech may not be regulated, regardless of whether the speech is coordinated. "Own speech" is defined by the RNC as speech that is "attributable" to the RNC and includes speech the candidate writes and decides how the speech is to be disseminated. In other words, the RNC argues that speech it adopts is attributed to it and therefore exempt from regulation regardless of the extent of coordination with the candidate.

Id. at 26a.

b. The district court concluded that petitioners' "own speech" claim was nonfrivolous, and the court therefore certified it (along with additional claims that

are not at issue here) to the en banc court of appeals. Pet. App. 178a-179a. The district court noted, however, that this Court's precedents contained "rather persuasive indications that coordinated communications can be Constitutionally regulated." *Id.* at 176a.

The district court observed that, under those precedents, restrictions on coordinated expenditures do not receive the type of heightened scrutiny applicable to restrictions on expenditures made without any input from the candidate ("independent expenditures"), but instead receive the lesser degree of scrutiny generally applicable to restrictions on campaign contributions. Pet. App. 176a (citing *Buckley* v. *Valeo*, 424 U.S. 1, 47 (1976) (per curiam); *FEC* v. *Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 464 (2001) (*Colorado II*)). The court explained that contributions may be regulated in order to prevent corruption or the appearance thereof, and that the same rationale justifies regulation of coordinated expenditures because such expenditures are "functionally" contributions. *Ibid.*; see *Colorado II*, 533 U.S. at 441, 457-461, 464. The district court further observed that if donations "to a party are used for coordinated communications, donors could easily circumvent" existing limits on direct contributions to candidates "by donating to the party instead." Pet. App. 176a (citing *Colorado II*, 533 U.S. at 464).

3. a. The en banc court of appeals rejected all of petitioners' constitutional claims, including their "own speech" challenge to FECA's coordinated-expenditure provisions. Pet. App. 1a-88a. As to that claim, the court stated that "[b]ecause we are a court of error and only decide issues the parties bring to us, it is important at the outset to identify the RNC's sole argument on this certified question." *Id.* at 25a-26a. The court observed

that "the only argument the RNC raised in its complaint, the only argument the district court addressed, the only argument the RNC raised in its briefs to the en banc court, and the only argument the RNC's counsel was willing to make at oral argument before the en banc court" was the argument that the RNC's "own speech may not be regulated regardless of whether the speech is coordinated." *Id.* at 26a-27a (footnotes omitted).

The court of appeals rejected that argument, concluding that it "cannot be reconciled with *Colorado II*." Pet. App. 40a. In *Colorado II*, this Court upheld the coordinated-expenditure restrictions of FECA against a facial First Amendment challenge. The Court stated that "[t]here is no significant functional difference between a party's coordinated expenditure and a direct party contribution to the candidate," and that "there is good reason to expect that a party's right of unlimited coordinated spending would attract increased contributions to parties to finance exactly that kind of spending." *Id.* at 31a (quoting *Colorado II*, 533 U.S. at 464-465). The court of appeals found petitioners' "exceedingly broad argument," to the effect that "all coordinated expenditures paid for and adopted by the party would be considered a party's own speech and thus not subject to restriction," to be "inconsistent" with this Court's reasoning in *Colorado II*. *Id.* at 34a-35a. The *Colorado II* Court's anti-corruption rationale was "particularly important" in this case, the court of appeals continued, because petitioners had admitted taking steps to circumvent contribution limits, including by encouraging donors who had already made the maximum allowable contributions to Cao to donate to the party and by organizing events where major donors to the party could have access to federal lawmakers. *Id.* at 35a-36a.

The court of appeals acknowledged that the Court in *Colorado II* had left open the possibility of an as-applied challenge to FECA's coordinated-expenditure provisions. Pet. App. 37a. The court explained, however, that while petitioners had described their claim as an as-applied challenge, the claim was not meaningfully different from the facial challenge that this Court had addressed and rejected in *Colorado II*. *Id.* at 37a-38a; see *id.* at 32a-33a (citing *Colorado II*, 533 U.S. at 456 n.17; *id.* at 468 n.2 (Thomas, J., dissenting)). The court of appeals explained that petitioners' argument "rests not on a sufficiently developed factual record, but rather, on the same general principles rejected by the Court in *Colorado II*." *Id.* at 38a; see *id.* at 38a n.25 (observing that petitioners' complaint "chiefly rel[ies] on the rationale of the *Colorado II* dissenting opinion").

The court of appeals further concluded that petitioners had failed to preserve a narrower argument endorsed by the dissenting judges—*i.e.*, that FECA's restrictions on party coordinated expenditures cannot constitutionally be applied when the only coordination concerns the *timing* of a party advertisement. See Pet. App. 40a-48a. The court stated that the argument was "not made in the district court, nor presented to us on appeal," and that it was "wholly disavowed by [petitioners'] counsel during oral argument." *Id.* at 47a. The court also observed that petitioners had acknowledged that the coordination between Cao and the RNC regarding the RNC's proposed advertisement would have involved Cao's awareness not only of the timing, but also of the advertisement's content. *Id.* at 43a-46a. The court stated that "even if [it] were to conclude that [the narrower coordination] issue was presented, it is clear * * * that an expenditure for an ad advocating the elec-

tion of the candidate coordinated as to timing, when the candidate has knowledge of the content of the ad, amounts to a coordinated expenditure that may be constitutionally regulated under *Colorado II*." *Id.* at 47a.

b. Chief Judge Jones, joined by four other judges (out of 16 judges on the en banc court), concurred in part and dissented in part. Pet. App. 49a-82a. In Chief Judge Jones's view, petitioners had preserved the argument that the particular advertisement described in their complaint could not constitutionally be restricted when the only coordination between the party and the candidate concerned the timing of the advertisement's broadcast. *Id.* at 52a-66a. She concluded that such a restriction would violate the First Amendment. *Id.* at 66a-79a.

Judge Clement, joined by three other judges who (like Judge Clement herself) had joined Chief Judge Jones's dissent, wrote a separate concurring and dissenting opinion. Pet. App. 82a-88a. Judge Clement advocated a constitutional standard under which a party's expenditure could be regulated as a coordinated expenditure only if "it is susceptible of no other reasonable interpretation than as a general expression of support for the candidate *and* the ad was not generated by the candidate." *Id.* at 85a. She acknowledged, however, that if Cao had been consulted regarding the content of the advertisement at issue in this case, or had consented to the RNC broadcasting it, "that would indeed raise a suspicion that the parties were attempting to circumvent the rules against coordination so that the RNC could pay the bill for *Cao's* speech—the evil at which the coordination rules are aimed." *Id.* at 84a-85a.

c. Judge Jolly filed a concurring opinion. Pet. App. 49a. He stated that he would concur in Chief Judge

Jones's opinion "if [he] agreed that the argument she addresses was the question that [petitioners] were actually presenting for decision." *Ibid.* Judge Jolly "concur[red] in the result reached by the majority," however, based on his view that the majority opinion "reflects the more accurate and realistic way the case has been presented for decision." *Ibid.*

ARGUMENT

The court of appeals correctly rejected petitioners' challenge to FECA's restrictions on coordinated expenditures. The court of appeals' decision does not conflict with any decision of this Court or of any other court of appeals, and petitioners failed to preserve below a central argument in the petition. Further review is not warranted.

1. In *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), this Court held that FECA's limitations on independent expenditures in support of candidates violated the First Amendment. *Id.* at 39-59. The Court upheld the Act's limitations on contributions to candidates, however, see *id.* at 23-38, stating that the contribution limits "constitute the Act's primary weapons against the reality or appearance of improper influence stemming from the dependence of candidates on large campaign contributions," *id.* at 58. In explaining that conclusion, the Court recognized that the term "contribution," as defined in the Act, "include[s] not only contributions made directly or indirectly to a candidate, * * * but also all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate." *Id.* at 78. That definition, the Court observed, "prevent[s] attempts to circumvent the

Act through prearranged or coordinated expenditures amounting to disguised contributions." *Id.* at 47.

2. Before 1996, the Commission presumed that, due to the close connection between parties and candidates, "all party expenditures should be treated as if they had been coordinated as a matter of law." *Colorado Republican Fed. Campaign Comm.* v. *FEC*, 518 U.S. 604, 619 (1996) (*Colorado I*) (opinion of Breyer, J.) (emphasis omitted). In *Colorado I*, however, this Court held that parties were capable of making independent (*i.e.*, non-coordinated) expenditures and that such expenditures could not constitutionally be limited. See *id.* at 617; *id.* at 627 (opinion of Kennedy, J.). The Court remanded the case for further proceedings to consider the constitutionality of FECA's limits on party expenditures that are actually coordinated with candidates. See *id.* at 623-626 (opinion of Breyer, J.).

After the proceedings on remand, the case returned to this Court in *FEC* v. *Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) (*Colorado II*). The Court in *Colorado II* rejected the plaintiff's facial challenge to FECA's limits on political parties' coordinated expenditures. *Id.* at 437. The Court reaffirmed *Buckley*'s anti-corruption rationale for distinguishing between coordinated and independent expenditures, and it concluded that the distinction applies equally to spending by political parties. *Id.* at 463-464. The Court explained that "[t]here is no significant functional difference between a party's coordinated expenditure and a direct party contribution to the candidate, and there is good reason to expect that a party's right of unlimited coordinated spending would attract increased contributions to parties to finance exactly that kind of spending." *Id.* at 464. The Court accordingly held that

Congress may, consistent with the First Amendment, place limits on parties' coordinated expenditures. *Id.* at 437.

3. a. The court of appeals correctly concluded that *Colorado II* forecloses the broad "own speech" argument (Pet. 12-15) that petitioners raised below and renew in this Court. Under petitioners' theory, a communication is beyond the constitutionally permissible reach of FECA's coordinated-expenditure limits if it is "attributable" to a party, no matter how great the candidate's role in the communication's content or dissemination. Pet. 19; see Pet. App. 26a. In petitioners' view, the degree of collaboration and coordination between the party and the candidate is irrelevant "even if the candidate or her campaign actually creates the communication and passes it along to the party." Pet. App. 34a-35a; see Pet. 10 n.8 ("If an ad's speech is attributable to the party, it should not be deemed a contribution even if coordinated.").

Petitioners' theory is directly at odds with the core rationale of *Colorado II*. The holding in that case turned not on the nominal identity of the speaker, but instead on the "constitutionally significant fact" of the presence or absence of "coordination between the candidate and the source of the expenditure." 533 U.S. at 464 (quoting *Colorado I*, 518 U.S. at 617 (opinion of Breyer, J.)); see *McConnell* v. *FEC*, 540 U.S. 93, 221 (2003) ("[E]xpenditures made after a 'wink or a nod' often will be 'as useful to the candidate as cash.'") (quoting *Colorado II*, 533 U.S. at 442, 446). The Court concluded that Congress may regulate a party's coordinated expenditures, not because they are deemed to be the speech of someone other than the party, but instead because their "special value as expenditures"—that is, their coordina-

tion with candidates—"is also the source of their power to corrupt." *Colorado II*, 533 U.S. at 464-465.

b. Seeking to reconcile their argument with *Colorado II*, petitioners rely (*e.g.*, Pet. 3) on footnotes in the majority and dissenting opinions in that case. With respect to the conclusion that the lower level of constitutional scrutiny applicable to contribution limits also applies to limits on party coordinated expenditures, the Court in *Colorado II* stated:

> Whether a different characterization, and hence a different type of scrutiny, could be appropriate in the context of an as-applied challenge focused on application of the limit to specific expenditures is a question that, as JUSTICE THOMAS notes, we need not reach in this facial challenge.
>
> The Party appears to argue that even if the Party Expenditure Provision is justified with regard to coordinated expenditures that amount to no more than payment of the candidate's bills, the limitation is facially invalid because of its potential application to expenditures that involve more of the party's own speech. But the Party does not tell us what proportion of the spending falls in one category or the other, or otherwise lay the groundwork for its facial overbreadth claim.

533 U.S. at 456 n.17 (certain citations omitted). Justice Thomas's dissent stated that "[t]o the extent the Court has not defined the universe of coordinated expenditures and leaves open the possibility that there are such expenditures that would not be functionally identical to direct contributions, the constitutionality of the Party Expenditure Provision as applied to such expenditures

remains unresolved." *Id.* at 468 n.2 (Thomas, J., dissenting).

Although the Court in *Colorado II* acknowledged the possibility that FECA's limits on party coordinated expenditures might be unconstitutional in some applications, the Court did not suggest that the *permissible* applications are limited to "paying candidates' bills for polling, printing, rent, utilities, consultants, etc." or "paying a candidate's media bills." Pet. 14 n.9. To the contrary, the Court in *Colorado II* recognized that "[c]oordinated spending by a party * * * covers a spectrum of activity, as does coordinated spending by other political actors." 533 U.S. at 445. Under petitioners' constitutional theory, the RNC could spend unlimited sums to disseminate speech that the candidate had written, in accordance with the candidate's instructions as to the manner in which the speech should be disseminated, so long as the speech is "attributable" to the RNC. Pet. App. 26a. Petitioners thus argue that the FECA limits are unconstitutional, not simply in some small set of outlier scenarios, but with respect to spending that is little different from direct payment of a candidate's bills.

As the court of appeals correctly recognized, petitioners have not presented the type of as-applied challenge contemplated in *Colorado II*. Pet. App. 33a-38a. Petitioners affirmatively disavowed an argument that "the level of coordination should affect whether an expenditure may be regulated," *id.* at 27a, instead advancing the "exceedingly broad" argument that "Congress cannot regulate a party's own speech regardless of the degree of coordination with the candidate," *id.* at 34a. As the court of appeals observed, petitioners' argument "rests not on a sufficiently developed factual record, but rather, on the same general principles rejected by the

Court in *Colorado II*, namely the broad position that coordinated expenditures may not be regulated." *Id.* at 38a.

Essentially all of the specific arguments petitioners raise in support of their broad "own speech" argument were considered and rejected in *Colorado II*.[2] Petitioners' suggestion (Pet. 16-19) that the only "constitutionally significant difference" is "between expenditures and contributions" conflicts with *Colorado II*'s observation, in response to an analogous argument, that the relevant constitutional line is not between *contributions* and *expenditures*, but between *coordinated* expenditures and *independent* expenditures. See 533 U.S. at 463 ("The analysis" of decisions striking down limits on independent expenditures "ultimately turned on the understanding that the expenditures at issue were not potential alter egos for contributions, but were independent and therefore functionally true expenditures, qualifying for the most demanding First Amendment scrutiny employed in *Buckley*."). *Colorado II* likewise refutes petitioners' argument (Pet. 23-25) that there is no sufficient anti-corruption rationale for regulating coordinated expenditures. See, *e.g.*, 533 U.S. at 457 ("[T]he question is

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[2] Petitioners briefly suggest (Pet. 23) that this Court's decision in *Citizens United* v. *FEC*, 130 S. Ct. 876 (2010), has weakened the anti-circumvention rationale underlying *Colorado II*. The Court in *Citizens United*, however, addressed limits on independent corporate spending, not on party coordinated expenditures. Indeed, the Court specifically distinguished independent from coordinated spending, emphasizing that the independent expenditures at issue in that case could not constitutionally be limited because "[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent * * * alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Id.* at 908 (quoting *Buckley*, 424 U.S. at 47).

whether experience under the present law confirms a serious threat of abuse from the unlimited coordinated party spending as the Government contends. It clearly does.") (citation omitted).[3] And while petitioners assert (Pet. 28-29) that independent expenditures are less effective than coordinated expenditures, the Court in *Colorado II* (as in prior cases) treated the greater effectiveness of coordinated spending as a justification for allowing such expenditures to be regulated more closely than independent expenditures can be. See *id.* at 441 ("[I]ndependent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination * * * also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.") (quoting *Buckley*, 424 U.S. at 47).

Petitioners suggest (Pet. 25-34) that coordinated-expenditure limits place greater burdens on political parties than on other regulated entities. The Court in

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[3] Petitioners attempt (Pet. 24) to distinguish *Colorado II* on the ground that one practice described in that case—a system known as "tallying," whereby a party would spend money on candidates whose donors contributed to the party—was not followed here. But the Court in *Colorado II* did not hold or suggest that Congress's authority to regulate coordinated expenditures is limited to circumstances where tallying occurs. Rather, the Court simply identified that practice as one piece of evidence that coordinated expenditures can be used to circumvent contribution limits. See 533 U.S. at 458-460 & n.22. Furthermore, the findings in this case, which show that Cao urged donors who had contributed the maximum allowable amount to him to contribute additional money to the party itself, support the Court's conclusion in *Colorado II* that "[d]onors give to the party with the tacit understanding that the favored candidate will benefit." *Id.* at 458; see Pet. App. 35a-36a.

Colorado II rejected a similar contention, concluding that "[t]he Party's arguments for being treated differently from other political actors subject to limitation on political spending under the Act do not pan out." 533 U.S. at 455. The Court observed that parties are "in the same position as some individuals and [political action committees], as to whom coordinated spending limits have already been held valid," and that "indeed, a party is better off [than individuals and other political committees], for a party has the special privilege the others do not enjoy, of making coordinated expenditures up to" amounts that are higher than FECA's generally applicable contribution limits. *Ibid.* The Court also noted that "political parties are dominant players, second only to the candidates themselves, in federal elections." *Id.* at 449-450 (citation omitted).[4]

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[4] Although petitioners suggest (Pet. 32-34) that the role of political parties has materially waned since *Colorado II*, the available evidence does not support that assertion. Political parties made tens of millions of dollars in coordinated expenditures, and more than $100 million in independent expenditures, in each of several recent election cycles. Pet. App. 127a; see http://www.fec.gov/press/bkgnd/cf_summary_info/2010party_Summary/2repfedactivity2010.pdf (national Republican Party made $72,146,476 in independent expenditures in 2010 election cycle); http://www.fec.gov/press/bkgnd/cf_summary_info/2010party_Summary/1demfedactivity2010.pdf (national Democratic Party made $106,915,166 in 2010 election cycle). The magnitude of the parties' continued independent expenditures belies petitioners' suggestions that such expenditures are ineffective or that arranging for them is impractical. Furthermore, FEC guidance explains that the firewalls between regular party operatives and those involved in independent expenditures need not be as strict as petitioners claim. See, *e.g.*, *Coordinated Communications*, 71 Fed. Reg. 33,190, 33,206-33,207 (2006) (noting that "common leadership," "overlapping administrative personnel," and "mere contact or communications" not involving inside information about election efforts do not invalidate a party's firewall procedures).

In any event, petitioners provide no sound reason to conclude that Congress is constitutionally obligated to confer advantages on political parties when it regulates campaign financing. To the contrary, "parties' capacity to concentrate power to elect is the very capacity that apparently opens them to exploitation as channels for circumventing contributions and coordinated spending limits binding on other political players." 533 U.S. at 455.

d. Although *Colorado II* did not foreclose as-applied challenges to FECA's limits on party coordinated expenditures, petitioners' reassertion of arguments that were previously rejected by this Court does not constitute a proper as-applied challenge. Cf., *e.g.*, *Gonzales* v. *Carhart*, 550 U.S. 124, 167 (2007) (as-applied challenges contest the constitutionality of a statute "in discrete and well-defined instances"). Petitioners' reliance (Pet. 14-15) on *FEC* v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007), is misplaced. The plaintiff in that case did not seek to relitigate arguments that had been rejected in a previous facial challenge, but instead presented the Court with three specific advertisements, arguing that those advertisements and "materially similar" ones could not constitutionally be restricted. *Id.* at 460 (plurality opinion).

This case is instead comparable to *Republican National Committee* v. *FEC*, 698 F. Supp. 2d 150, 157 (D.D.C. 2010), aff'd, 130 S. Ct. 3544 (2010) (per curiam). In that case, the three-judge district court rejected a putative as-applied challenge brought by the RNC. The court observed that "a plaintiff cannot successfully bring an as-applied challenge to a statutory provision based on the same factual and legal arguments the Supreme Court expressly considered when rejecting a facial chal-

lenge to that provision." *Id.* at 157. This Court summarily affirmed.

e. Even if petitioners' putative as-applied challenge were not foreclosed by *Colorado II*, that challenge would not warrant this Court's review. Petitioners identify no other post-*Colorado II* court of appeals decision addressing FECA's party-coordinated expenditure limits, let alone any decision that conflicts with the Fifth Circuit's ruling here. Absent any division of authority, the petition for a writ of certiorari should be denied, even if the question it presented had not previously been resolved by this Court.

4. In addition to renewing the broad "own speech" challenge that the court of appeals rejected, petitioners ask this Court to address (Pet. 15) the narrower argument that an advertisement coordinated only as to timing cannot permissibly be regulated as a "coordinated" expenditure. The court of appeals held, however, that petitioners had failed to preserve that challenge, and petitioners offer no sound reason for this Court to address it in the first instance.

a. The court of appeals held that petitioner had forfeited the narrow timing-only-coordination argument because, *inter alia*, "counsel for the RNC refused to adopt the position that the level of coordination should affect whether an expenditure may be regulated." Pet. App. 27a. The court further held that petitioners had "conceded" at oral argument and in a post-argument letter "that the RNC intended to coordinate the Cao Ad with Cao not only with regard to timing, but *also* by providing Cao with advance knowledge of the Cao Ad's content." *Id.* at 43a; see *id.* at 43a nn.29-30.

The court of appeals addressed the merits of petitioners' narrower argument only by stating, "for the sake of

completeness," that "even if the court were to conclude that this issue was presented, it is clear to us that an expenditure for an ad advocating the election of the candidate coordinated as to timing, when the candidate has knowledge of the content of the ad, amounts to a coordinated expenditure that may be constitutionally regulated under *Colorado II*." Pet. App. 47a. The court reasoned that coordination of timing, in combination with content awareness, "contrasts sharply with the Supreme Court's functional definition of independent expenditures." *Id.* at 44a. The court noted that "if Cao approved of the content and found it favorable to his campaign, he may have told or requested the RNC to run the ad frequently during prime hours. If Cao disapproved of the Cao Ad's content and found it unfavorable to his campaign, he may have told or requested the party to run it infrequently during off hours, or perhaps not at all." *Ibid.*

The court of appeals accordingly never addressed the timing-*only*-coordination argument that petitioners now advance. This Court does not ordinarily consider issues that were neither pressed nor passed on below, see, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993), and there is no reason for it to do so here. To the extent that petitioners address the forfeiture issue, they simply urge this Court to adopt the conclusions of the dissenting judges on the court of appeals that petitioners preserved this claim. See Pet. 6 n.3, 8-9 & n.6. But resolving the fact-bound and record-intensive question of whether petitioners adequately preserved the timing-only-coordination argument would not be a sound expenditure of this Court's limited resources.

b. The timing-only-coordination issue would not warrant this Court's review even if it had been raised

below. Petitioners do not allege that there is any conflict in the circuits on the question. And there has been no factual development regarding the nature of the coordination that would have occurred between Cao and the RNC regarding the timing of the ad. Petitioners' complaint, the joint stipulations of fact, and petitioners' presentation at oral argument all simply indicate, in a generalized fashion, that the party and the candidate contemplated some degree of coordination. Pet. App. 24a, 25a n.16, 155a. Petitioners assert (*e.g.*, Pet. 15) that the degree of coordination would have been "*de minimis*," but neither the accuracy nor the precise meaning of that statement is clear from the existing record. The factual uncertainty regarding whether (for example) Cao could have suggested that the ad *never* be aired, see *id.* at 44a, renders this case a poor vehicle for determining how much coordination is necessary before an expenditure may be regulated.[5] Indeed, depending on the degree of coordination envisioned, petitioners' conduct might not even be covered by the FEC's regulations, which require that the candidate be "materially involved" in timing decisions before an expenditure will be considered to be coordinated. 11 C.F.R. 109.21(d)(2)(v).

Furthermore, the ability to coordinate as to the timing of campaign advertisements is not properly described as "*de minimis*." Coordination regarding timing

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[5] The same uncertainty renders this case an unsuitable vehicle for considering the test proposed in Judge Clement's dissenting opinion (which, in any event, petitioners did not advocate below). Judge Clement would have decided the case on the premise that "Cao did not provide input on the [ad's] content and was not asked to provide his consent to run the ad." Pet. App. 84a. She acknowledged that "[i]f he had, that would indeed raise a suspicion that the parties were attempting to circumvent the rules against coordination." *Ibid.*

can provide significant benefits that are unavailable in the case of truly independent expenditures. See, *e.g.*, Pet. App. 44a n.32 (Cao believed that some of the independent expenditures had not helped his campaign); FEC Matter Under Review ("MUR") 5887 (Republican Main Street Partnership PAC), General Counsel's Report #2 at 2, 6 (Dec. 9, 2008), http://eqs.nictusa.com/eqsdocsMUR/29044243895.pdf (testimony from campaign staffer that outside group's failure to time response ad appropriately made the ads far less useful and disrupted the campaign's plan to focus on other media while letting the outside group focus on television and radio). For that reason, as well as the other reasons described above, petitioners' forfeited argument challenging the regulation of party election expenditures involving "*de minimis*" coordination does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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